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272 A.D. 698

Supreme Court, Appellate Division, Second Department, New York.

People v. Estreich

Supreme Court, Appellate Division, Second Department, New York. November 25, 1947 | 272 A.D. 698 | 75 N.Y.S.2d 267 (Approx. 6 pages)

v. ESTREICH.

Nov. 25, 1947.

Synopsis

Appeal from Queens County Court; Thomas Downs, Judge.

Max **Estreich** was convicted of criminally receiving stolen property, and from the judgment and an order denying his motion in arrest of judgment and for dismissal of the indictment, he appeals.

Judgment reversed, indictment dismissed and defendant discharged.

West Headnotes (7)

[Change View](#)

- Criminal Law** [Grounds for Arrest of Judgment](#)
Criminal Law [Form and requisites in general](#)
 Objection that facts alleged in indictment do not constitute a crime and that the Penal Law under which indictment was drawn is unconstitutional is properly raised by a motion in arrest of judgment after conviction.
- Constitutional Law** [Larceny, embezzlement, and receiving stolen property](#)
Receiving Stolen Goods [Nature and elements in general](#)
 The 1943 amendment of the Penal Law making criminal the mere receipt by a junk dealer of stolen "machinery equipment" without requirement of guilty knowledge or diligent inquiry by the junk dealer as to legal rights of the party selling to him, is invalid as a denial of due process since it is an illegal and arbitrary interference with a lawful business. Penal Law, § 1308, subd. 1, par. b; [U.S.C.A. Const.Amend. 14](#); [Const.N.Y. art. 1, § 6](#).

[1 Case that cites this headnote](#)
- Criminal Law** [Construction and Operation in General](#)
 Where an offense is defined in the same language as was employed before change or amendment of a statute, or substantially the same, it will be presumed that no change was intended by the Legislature.

SELECTED TOPICS

[Receiving Stolen Goods](#)

[Nature and Elements](#)

[Receiving Stolen Property Statute](#)

[Construction and Operation](#)

[Proscription of Criminal Statute Conduct](#)

[Criminal Law](#)

[Review](#)

[Murder Case](#)

Secondary Sources

APPENDIX I-FEDERAL STATUTES

FDA Enforcement Man. Appendix I

...Whoever makes or presents to any person or officer in the civil, military, or naval service of the United **States**, or to any department or agency thereof, any claim upon or against the United **States**, or...

CONTROLLED SUBSTANCES ACT

Controlled Substances Hdbk. Act

...Sec. [U.S.C.] 101 [801] Congressional findings and declarations: controlled substances 101a [801a] Congressional findings and declarations: psychotropic substances 102 [802] Definitions 201 [811] Autho...

What Constitutes "Aggravated Felony" for Which Alien Can Be Deported or Removed Under s237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C.A. s1227(a)(2)(A)(iii))--Theft or Burglary Offenses Under 8 U.S.C.A. s1101(a)(43)(G)

62 A.L.R. Fed. 2d 255 (Originally published in 2012)

...Pursuant to 8 U.S.C.A. § 1227(a)(2)(A)(iii), aliens are subject to deportation or removal where they have been convicted of an "aggravated felony" that, as defined in 8 U.S.C.A. § 1101(a)(43)(G), inclu...

See More Secondary Sources

Briefs

Brief for Petitioners.

1956 WL 89221
 Shirley KREMEN, Samuel Irving Coleman, and Sidney Steinberg, Petitioners, v. United **States** of America, Respondent.
 Supreme Court of the United **States**
 Nov. 28, 1956

...A written order of the District Court, denying a motion for the return of property allegedly illegally seized, was not reported, but appears at pages 26-28 of the Record and is printed at pages 1 to 3 ...

Brief for the Petitioner

2006 WL 3064108
 Alberto R. GONZALES, Attorney General, petitioner, v. Luis Alexander DUENAS-ALVAREZ.
 Supreme Court of the United **States**
 Oct. 26, 2006

...The opinion of the court of appeals (Pet. App. 1a-2a) is not published in the Federal Reporter but is reprinted in 176 Fed. Appx.

4 Constitutional Law **Criminal Law**

Where the statute prior to amendment penalized receipt of stolen goods by junkman without diligent inquiry to ascertain legal rights of the seller or deliverer and amendment omitted requirement of lack of diligent inquiry, such requirement could not be read into amendment to save its validity as a denial of due process, since such requirement had been deliberately excised by the Legislature. Penal Law, § 1308, subd. 1, par. b; [U.S.C.A. Const.Amend. 14](#); [Const.N.Y. art. 1, § 6](#).

5 Receiving Stolen Goods **Nature and elements in general**

Invalidity of subdivision 1, paragraph b of the 1943 amendment to the statute penalizing the receipt of stolen goods by junkman without diligent inquiry to ascertain legal rights of the seller or deliverer, for omitting lack of diligent inquiry is not cured by subdivision 3 creating a statutory presumption of guilty knowledge, since the subdivision merely prescribes a rule of evidence and is not part of the definition of the substantive crime. Penal Law, § 1308, subd. 1, par. b; subd. 3.

[1 Case that cites this headnote](#)

6 Constitutional Law **Certainty and definiteness in general**

A penal statute creating a new offense to be valid under due process must be definite in specifying the conduct condemned or prohibited, and sufficiently explicit to inform those subject to it what action on their part will render them liable to its penalties. [U.S.C.A. Const.Amend. 14](#).

[2 Cases that cite this headnote](#)

7 Constitutional Law **Larceny, embezzlement, and receiving stolen property****Receiving Stolen Goods** **Nature and elements in general**

The statute penalizing the receipt of stolen "machinery equipment" by a junkman without diligent inquiry that person selling or delivering the machinery has a legal right to do so lacks definiteness because of the quoted phrase and is insufficient to cover a quantity of drills and tools purchased by junkman without making the required inquiry. Penal Law, § 1308, subd. 1, par. b.

[1 Case that cites this headnote](#)

Attorneys and Law Firms

****268 *699** Mordecai Konowitz, of New York City, for appellant.

Henry W. Schober, Asst. Dist. Atty., of Ridgewood, and Charles P. Sullivan, Dist. Atty., of Long Island City, for respondent.

Before LEWIS, P. J., and HAGARTY, JOHNSTON, ADEL and NOLAN, JJ.

Opinion

LEWIS, Presiding Justice.

1 Defendant has been convicted of the crime of receiving stolen property, under an indictment charging that 'The defendant above named on or about June 11th, 1946 in the County of Queens, being then a dealer in and collector of junk, metals and second-hand materials, bought and received ****269** the following of the value of \$450.00, a quantity of drills and tools the property of R. S. Uzzell Corporation from Anthony Russo without ascertaining by diligent inquiry that said Anthony Russo had a legal right to sell and deliver the same.' There was evidence to establish that the defendant had received the drills and tools mentioned in the indictment. The principal question presented for determination arises upon defendant's ***700** contention, properly raised below on his motion in arrest of judgment, [People v. Silver, 251 App.Div. 309, 296 N.Y.S. 781](#). Code Cr.Proc. §§ 323, 331, 467, 469, that the facts alleged in the indictment do not constitute a crime and that paragraph b of subdivision 1 of section 1308 of the Penal Law is unconstitutional. In our

820. The decisions of the Board of Immigration Appeals (Pet. App. 3a) a...

Petitioner's Opening Brief

2004 WL 2824511
Armando NAVARRO-LOPEZ, Petitioner, v. John ASHCROFT, U.S. Attorney General Respondent.
United **States** Court of Appeals, Ninth Circuit. Oct. 28, 2004

...The Immigration Judge and the Board of Immigration Appeals (Board) had jurisdiction to determine the Petitioner's removability under section 240(a) the Immigration and Nationality Act (the Act). I.N.A....

See More Briefs**Trial Court Documents****Doe v. United States of America**

2015 WL 10571522
Jane DOE, Petitioner, v. UNITED **STATES** OF AMERICA, Respondent.
United **States** District Court, N.D. California. May 29, 2015

...JOHN GLEESON, United **States** District Judge: Jane Doe filed an application on October 30, 2014, asking me to expunge her thirteen-year old fraud conviction because of the undue hardship it has created f...

U.S. v. Kang

2018 WL 8141049
UNITED **STATES** OF AMERICA, v. Ikaika Erik KANG.
United **States** District Court, D. Hawai'i. Dec. 04, 2018

...[] pleaded guilty to count(s): 1-4 of the Indictment. [] pleaded nolo contendere to counts(s) _ which was accepted by the court. [] was found guilty on count(s) _ after a plea of not guilty. The defend...

U.S. v. Hawaiian Accessories, Inc.

2018 WL 8017044
UNITED **STATES** OF AMERICA, v. HAWAIIAN ACCESSORIES, INC.
United **States** District Court, D. Hawai'i. Sep. 05, 2018

...[] admitted guilt to violation of General Condition, 16 U.S.C. § 1538(c), 50 CFR 14.63, 16 U.S.C. § 1538(d)(1)(A), 50 CFR 14.91(a), 16 U.S.C. § 3372(b), and 50 CFR 14.81 of the term of supervision. [] ...

See More Trial Court Documents

opinion, the attack upon the constitutionality of the statute must be sustained, the judgment of conviction reversed and the indictment dismissed.

2 Prior to its amendment by chapter 180 of the Laws of 1943, section 1308 of the Penal Law, which defined the crime of receiving stolen property, provided for the punishment of (1) persons who bought or received stolen property knowing it to have been stolen; and (2) persons who, being dealers in junk, metals or secondhand materials, or books, or engaged in the laundry supply service, bought or received certain enumerated stolen articles 'without ascertaining by diligent inquiry, that the person selling or delivering the same has a legal right to do so.' The crime set forth in the first category was the common law crime of receiving stolen property; that defined in the second was unknown at common law and was purely statutory. [People v. Brown](#), 191 App.Div. 708, 182 N.Y.S. 115; [People v. Gold](#), 239 App.Div. 368, 267 N.Y.S. 582. The constitutionality of the provision which created the statutory crime was sustained in [People v. Rosenthal](#), 197 N.Y. 394, 90 N.E. 991, 46 L.R.A., N.S., 31.

The People concede that the indictment in the case at bar is based upon that portion of section 1308 of the Penal Law, as amended in 1943, which provides: 'A person who 1. * * * b. Being a dealer in or collector of junk, metals or second hand materials, * * * buys or receives * * * any machinery equipment * * * Is guilty of a felony * * * if it was purchased for resale or by a dealer, * * *.' As it is now defined in subdivision 1, par. b of section 1308, the statutory crime of receiving stolen property no longer includes as an element the dealer's failure to ascertain 'by diligent inquiry' that the person selling the property has a legal right to do so. While paragraphs c and d, of subdivision 1, which refer to book dealers and those engaged in laundry supply service, contain a provision for 'reasonable inquiry', the Legislature saw fit to omit any such requirement in subdivision 1, par. b, relating to dealers in junk, metals, or secondhand materials. As a result, the mere purchase by a secondhand dealer of the articles enumerated in subdivision 1, par. b renders him guilty of a felony, regardless of his knowledge or intent.

****270** We are of the opinion that such an enactment is without the power of the Legislature, and that it violates the due process ***701** clause of the Fourteenth Amendment to the Constitution of the United States, and [Article 1, section 6](#), of the Constitution of the State of New York. In [People v. Rosenthal](#), supra), section 1308 of the Penal Law, in so far as it related to the statutory crime of receiving, was held constitutional because of the provision relating to 'diligent inquiry'. The Court of Appeals there said (197 N.Y. 400, 90 N.E. 994):

'By adding the duty of diligent inquiry before purchasing, it protects the junk dealers who in good faith comply with the statute and provides for the punishment of those who do not.

'Under this construction, the attack upon the substance of the indictment has no foundation, for the statute upon which it rests is not open to objection under either Constitution, State or Federal. * * * While it makes the proper discharge of an active duty a 'test of criminality,' all that it requires is good faith and honest inquiry, and that is no more than is required by the common law in some cases, especially in the purchase of commercial paper under certain circumstances. The junk dealer is not responsible for the truth of what he ascertains by inquiring, but he runs the risk if he purchases without diligent inquiry to ascertain the truth. The Legislature had the right to declare a junk dealer who purchases stolen property of a kind that is the constant subject not only of larceny but of sale to junk dealers guilty of a crime, whether he actually knew it had been stolen or not, provided he did not try to find out by making diligent inquiry.'

This requirement for 'diligent inquiry' was retained in section 1308 throughout all the amendments thereto, until its amendment by chapter 180 of the Laws of 1943, see ch. 93, L.1914; ch. 366, L.1916; ch. 570, L.1920; ch. 429, L.1921; ch. 707, L.1926; ch. 354, L.1928; ch.513, L.1938; ch. 443, L.1940. It is the failure of subdivision 1, par. b of section 1308, as amended by chapter 180 of the Laws of 1943, to contain a similar provision for diligent or reasonable inquiry which constitutes it an illegal and arbitrary interference with a lawful business and, therefore, unconstitutional. [People v. Rosenthal](#), supra; [People v. Gillson](#), 109 N.Y. 389, 17 N.E. 343, 4 Am.St.Rep. 465; [In re Ah Jow](#), C.C., 29 F. 181; [Kilbourne v. State](#), 84 Ohio St. 247, 95 N.E. 824, 35 L.R.A., N.S., 766; [State v. Park](#), 42 Nev. 386, 178 P. 389.

3 4 The People contend, upon the authority of [People v. Fanshawe](#), 137 N.Y. 68, 32 N.E. 1102, that the requirement for reasonable inquiry may be considered as actually

present in subdivision 1, par. b. The cited case does not support that contention. It was there held that, 'Where an offense is defined in the same language as was employed before, or substantially the same, it will be presumed that no change was intended.' [Page 74 of 137 N.Y., page 1103 of 32 N.E.](#) In [*702](#) the instant case the statute as amended omits an essential element of the crime as it [**271](#) had previously existed. It does not contain the same, 'or substantially the same' language as it did heretofore; and we may not read into the statute a provision which was deliberately excised by the Legislature.

5 Nor is the invalidity of subdivision 1, par. b cured by subdivision 3 of section 1308. That subdivision merely prescribes a rule of evidence, and is not a part of the definition of the substantive crime. [People v. Nelson, 234 App.Div. 481, 255 N.Y.S. 558, affirmed 260 N.Y. 559, 184 N.E. 91; People v. Gold, 239 App.Div. 368, 267 N.Y.S. 582, supra.](#)

6 7 While subdivision 1, par. b of section 1308 of the Penal Law is unconstitutional for the reasons indicated, we also deem it advisable to point out that the words 'machinery equipment' in that paragraph, as added by the 1943 amendment, lack the certainty required in a penal statute. Such a statute must be definite in specifying the conduct which is condemned or prohibited. [People v. Grogan, 260 N.Y. 138, 183 N.E. 273, 86 A.L.R. 1266.](#) Its terms must be sufficiently explicit to inform those who are subject to it what action on their part will render them liable to its penalties. [Connally v. General Const. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322.](#) Subdivision 1, par. b, in so far as it refers to 'machinery equipment' does not meet that test. As it is commonly defined and understood, 'machinery' relates to a part of a machine. The People claim that by the addition of the word 'equipment', 'machinery equipment' may be construed as including the tools and drills set forth in the indictment here. Although that contention may be etymologically correct, in everyday speech the words 'machinery equipment' have no such meaning. Cf. [McBoyle v. United States, 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816.](#) The use of such a vague expression is particularly to be condemned in the definition of the statutory crime of receiving stolen property, wherein the prosecution is not required to prove defendant's knowledge that the property was stolen; and is in contrast with the balance of subdivision 1, par. b, which carefully enumerates the other articles which may be the subject of the statutory crime.

In view of the foregoing, it becomes unnecessary for us to pass upon the various other grounds urged by defendant for reversal of the judgment of conviction.

The judgment of conviction and order should be reversed on the law, the indictment dismissed, and the defendant discharged.

Judgment and order of the County Court, Queens County, reversed on the law, the indictment dismissed and the defendant discharged.

HAGARTY, JOHNSTON, ADEL and NOLAN, JJ., concur.

All Citations

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